Filed 2/15/05 P. v. Portwood CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBERT MICHAEL PORTWOOD, Defendant and Appellant.	E035420 (Super.Ct.No. RIF107176) **OPINION**

APPEAL from the Superior Court of Riverside County. Dennis A. McConaghy, Judge. Affirmed as modified.

Sylvia Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Lilia E. Garcia, Supervising Deputy Attorney General, and Janelle Boustany, Deputy Attorney General, for Plaintiff and Respondent.

When police officers tried to stop the car he was driving for a routine traffic violation, defendant Robert Michael Portwood led them on a car chase; he then bailed out of the car, and one officer chased him on foot. Defendant was armed with a loaded semiautomatic handgun (which had been stolen from its owner). He pointed the gun at the pursuing officer three separate times. There was evidence that he even pulled the trigger; the gun did not fire only because he neglected to pull back the slide first, so there was no bullet in the chamber.

The pursuing officer, displaying exemplary self-restraint, did not shoot defendant; he simply kept chasing him. At last, he tackled him, knocking the gun out of his hands. Defendant tried to shake the officer off his back, while reaching for his gun. A second officer had to jump on defendant's back before defendant could be handcuffed and arrested. Methamphetamine was found in the car, which may explain some of defendant's actions.

Although defendant was charged with 13 counts, including possession of methamphetamine while armed with a firearm, reckless evading, and attempted murder of a police officer, a jury found him guilty on only three: (1) simple assault on a peace officer (as a lesser included offense of aggravated assault), (2) resisting an executive officer, and (3) possession of a firearm by a felon.

Defendant told the probation officer "he takes full responsibility for his actions" and "he would like to apologize . . . to everyone involved . . . ."

Nevertheless, defendant appeals. Admittedly, three of his five contentions concern the ensuing sentence, and we find one such contention meritorious. Defendant's contentions are that:

1. The trial court failed to instruct on the specific intent required for resisting an executive officer and instructed instead that this crime required only general criminal intent.

2. The trial court erroneously failed to instruct on the lesser included offense of resisting an officer.

3. The trial court erred by imposing a five-year prior serious felony enhancement, because defendant had no current serious felony conviction.

4. The trial court erred by imposing on-bail enhancements, because defendant had not admitted them and they had not been found true.

5. The trial court erred under *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531, 159 L.Ed.2d 403] (*Blakely*) by imposing an upper-term sentence and by sentencing consecutively.

The People concede that defendant was not subject to a five-year prior serious felony enhancement. We agree. The People also concede that the trial court should not have imposed any on-bail enhancements. As to this, however, we disagree; the record is adequate to show that defendant did admit them. Otherwise, we find no error. Thus, we will strike the prior serious felony enhancement and affirm the judgment as modified.

I

FACTUAL BACKGROUND

Officers Gavin Lucero and Chris Wagner were parked in a marked patrol car when a car passed them, going 45 to 50 miles per hour in a 25-miles-per-hour school zone. They started to follow it. They turned on their lights and siren, but the car continued to speed; it made evasive turns, and meanwhile it committed additional traffic violations. At one point, it barely missed a boy on a bicycle.

Suddenly, the car stopped. Defendant, who was the driver, ran one way, and a passenger ran another. Officer Lucero ran after defendant. Defendant climbed over a wooden fence, then fell on the other side. As Officer Lucero was climbing over the fence, he saw defendant draw a gun and point it at him. Officer Lucero "froze" on top of the fence. He drew his own gun, pointed it at defendant, and ordered him to drop the gun. Instead, defendant got up and started running again. Twice more, when defendant either fell or stumbled, he pointed his gun at Officer Lucero.

Officer Lucero caught up with defendant and tackled him. Defendant's gun fell to the ground. Defendant struggled, "throwing elbows and kicking his feet . . . ." Officer Lucero climbed onto his back and applied a chokehold, but defendant kept trying to get up on all fours and to move toward the gun.

Officer Wagner, having apprehended the passenger, came to Officer Lucero's assistance. Together they managed to handcuff defendant, although he continued to struggle, both before and after the cuffs were on.

Defendant's gun was a .40-caliber semiautomatic. It had been reported stolen about two years earlier. There were seven bullets in the magazine, but no bullet in the chamber. The trigger was pulled back. On this model of gun, this meant that the trigger had been pulled, but without pulling the slide first to chamber a bullet from the magazine. The gun was operable, so if this had been done, it would have fired.

Methamphetamine weighing 3.51 grams was found in a container on the driver's seat of the car. The owner of the car testified that she knew nothing about the methamphetamine.

A civilian eyewitness testified that Officer Lucero went over the wooden fence without stopping. Although he also saw the latter portion of the chase, he did not see defendant point the gun at Officer Lucero.

II

PROCEDURAL BACKGROUND

Defendant was convicted on three counts:

Count 4: Simple assault on a peace officer (Pen. Code, § 241, subd. (b)), as a lesser included offense of assault on a peace officer with a semiautomatic firearm (Pen. Code, § 245, subd. (d)(2)). A personal firearm use enhancement (Pen. Code, § 12022.53, subd. (b)) on this count was found not true.

Count 6: Resisting an executive officer. (Pen. Code, § 69.)

Count 9: Possession of a firearm by a felon. (Pen. Code, § 12021, subd. (a)(1).)

One five-year prior serious felony allegation (Pen. Code, § 667, subd. (a)) and one "strike" prior allegation (Pen. Code, §§ 667, subds. (b) - (i), 1170.12) were found true.

Defendant was acquitted of attempted murder of a peace officer (Pen. Code, §§ 187, subd. (a), 664, subd. (e)), two more counts of assault on a peace officer with a semiautomatic firearm (Pen. Code, § 245, subd. (d)(2)), assault on a peace officer by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (c)), reckless evading (Veh. Code, § 2800.2), receiving stolen property (Pen. Code, § 496, subd. (a)), possession of methamphetamine while armed with a firearm (Pen. Code, § 11370.1), and transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)). One count of receiving a stolen motor vehicle (Pen. Code, § 496d, subd. (a)) was dismissed. A motion for acquittal on one count of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)), allegedly an automobile, was granted.

As we will discuss further in part VI, *post*, "on-bail" enhancements (Pen. Code, § 12022.1) as to each count were alleged, but no finding was made on them.

The trial court sentenced defendant as follows:

On count 6, resisting an executive officer (Pen. Code, § 69), the principal term: six years, representing the upper term of three years, doubled pursuant to the three strikes law.

On count 9, possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)): 16 months, representing one-third the midterm of two years, doubled pursuant to the three strikes law, to be served consecutively.

On count 4, simple assault on a peace officer (Pen. Code, § 241, subd. (b)): one year, to be served concurrently.

On the prior serious felony enhancement (Pen. Code, § 667, subd. (a)): five years, to be served consecutively.

On the on-bail enhancements (Pen. Code, § 12022.1) to count 6 and count 9: two enhancement terms of one year each, to be served consecutively, for a total of two years.

Accordingly, the total sentence was 14 years 4 months.

III

GIVING A GENERAL INTENT INSTRUCTION RATHER THAN A SPECIFIC INTENT INSTRUCTION ON PENAL CODE SECTION 69

Defendant contends the trial court erred in instructing the jury on the intent element of obstructing or resisting an executive officer (Pen. Code, § 69).

A. *Additional Factual and Procedural Background*.

The trial court instructed that: "Defendant[i]s accused in Count VI of having violated Section 69 of the Penal Code, a crime.

"Every person who willfully attempts by means of any threat or violence to deter or prevent an execut[i]ve officer from performing any duty imposed upon that officer by law, or who knowingly resists by use of force or violence an execut[i]ve officer in the performance of his or her duty, is guilty of a violation of Penal Code Section 69, a crime. [¶] . . . [¶]

"In order to prove this crime, each of the following elements must be proved:

"1. A person willfully attempted to deter or prevent an executive officer from performing any duty imposed upon that officer by law; and

"2. The attempt was accomplished by means of any threat or violence." (CALJIC No. 7.50.)

It also instructed that: "In the crime[] . . . charged in Count[] . . . VI, . . . there must exist a union or joint operation of act or conduct and general criminal intent. General criminal intent does not require an intent to violate the law. When a person intentionally does that which the law declares to be a crime, he is acting with general criminal intent, even though he may not know that his act or conduct is unlawful." (CALJIC No. 3.30.)

B. *Analysis*.

"[Penal Code section 69] sets forth two separate ways in which an offense can be committed. The first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; the second is resisting by force or violence an officer in the performance of his or her duty. [Citation.]" (*In re Manuel G*. (1997) 16 Cal.4th 805, 814; accord, *People v. Hines* (1997) 15 Cal.4th 997, 1061-1062.)

The first prong of the statute requires the specific intent to deter or prevent. (*People v. Hines*, *supra*, 15 Cal.4th at pp. 1060-1061.) It is not entirely clear whether the second prong of the statute likewise requires specific intent. (Compare *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1280 and *People v. Patino* (1979) 95 Cal.App.3d 11, 27 with *People v. Roberts* (1982) 131 Cal.App.3d Supp. 1, 9.) Here, however, it is apparent that defendant was prosecuted solely under the first prong. For one thing, CALJIC No. 7.50 provides two alternative versions, in brackets, of the elements of the offense; one lists the elements under the first prong, and the other lists the

elements under the second prong. The trial court read only the elements under the first prong. Moreover, the prosecutor argued that defendant was guilty of violating Penal Code section 69 solely because he chose "to willfully and unlawfully prevent or deter the officer from performing his function." Defense counsel likewise referred to the crime as "[d]eterring and preventing a person who is a peace officer."

Defendant therefore argues the trial court erred by instructing that the offense required general intent and by failing to instruct on the specific intent it did require. The People respond: "Appellant's claim of error is premised on the notion a violation of Penal Code section 69 defines not one, but two separate offenses, one of which requires specific intent and the other general intent." Certainly defendant takes this position, but it is hardly a "premise" of his claim. Whether the statute defines "two separate offenses," as defendant asserts, or one offense that can be committed in "two separate ways," as the People would have it, is beside the point. What matters is whether the jury should have been allowed to find defendant guilty even if he lacked the specific intent to deter or prevent. As our Supreme Court teaches us, it should not.

We therefore agree that specific intent was an element of the charged crime on which the jury had to be instructed. We do not agree, however, that the instructions, taken as a whole, failed to accomplish this. In this respect, *People v. Hering* (1999) 20 Cal.4th 440 is almost squarely on point.[1]

---

[1] The People's brief would have been of considerably more assistance to this court if it had cited *Hering* or, at a minimum, offered the same reasoning as *Hering*.

In *Hering*, the defendants were charged with offering kickbacks as an inducement to refer patients to a doctor, in violation of Business and Professions Code section 650 and Insurance Code section 750. (*People v. Hering*, *supra*, 20 Cal.4th at p. 442.) They asked the trial court to instruct that these crimes required a certain specific intent. The trial court refused to do so; it instructed instead that the crimes required only general criminal intent. (*Id*. at pp. 443-444.)

The Supreme Court noted that both crimes were defined in terms of offering an "inducement" for referring patients. (*People v. Hering*, *supra*, 20 Cal.4th at pp. 445-446.) It accepted that this could be read to require a specific intent, namely, the specific intent to induce the referral of patients. (*Id*. at p. 446.) Nevertheless, it held that the trial court did not err. It explained: "This case aptly illustrates the general principle that -- other than circumstances involving a mental state defense -- 'the characterization of a crime as one of specific intent [or general intent] has little meaningful significance in instructing a jury. The critical issue is the accurate description of the state of mind required for the particular crime.' [Citations.]" (*Id*. at p. 447, first brackets in original, quoting *People v. Faubus* (1975) 48 Cal.App.3d 1, 5.)

The court concluded that it was sufficient that the trial court had instructed on the "inducement" element of the crime: "Without being unavoidably tautological, one could not make an offer as inducement without intending to induce, i.e., the proscribed conduct incorporates the requisite culpable state of mind. [Citation.] The difference between making an offer 'as inducement for referrals' and making it 'with the specific intent to

induce referrals' is semantical at best and legally insignificant." (*People v. Hering*, *supra*, 20 Cal.4th at p. 477, fn. omitted.)

The court further held that giving the general intent instruction was not prejudicial: "[T]he general intent instruction . . . states that '[w]hen a person intentionally does that which the law declares to be a crime, he is acting with general criminal intent . . . .' [Citation.] With respect to Business and Professions Code section 650 and Insurance Code section 750, that which the law declares to be a crime is offering 'any . . . consideration . . . as . . . inducement' for referring patients, i.e., making such an offer for the purpose of inducing referrals. The jury thus could not have been misled." (*People v. Hering*, *supra*, 20 Cal.4th at p. 447.)

The identical reasoning applies here. The first prong of the statute prohibits "*attempt[ing]*, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law . . . ." (Pen. Code, § 69, italics added.) One could scarcely *attempt* to deter or prevent something without *intending* to deter or prevent it. (See *People v. Hood* (1969) 1 Cal.3d 444, 457, fn. 6 ["the ordinary usage of the word 'attempt'" includes a "strong suggestion of intent"]; *People v. Carmen* (1951) 36 Cal.2d 768, 775 ["[o]ne could not very well 'attempt' or try to 'commit' an injury on the person of another if he had no intent to cause any injury to such other person"]; cf. *People v. Williams* (2001) 26 Cal.4th 779, 785-787 [although "attempt" usually connotes specific intent, in assault statute, Pen. Code, § 240, Legislature used it otherwise, "consistent with the historical understanding of assault"].) That is precisely *why* this prong has been construed to require specific intent.

The jury, however, was duly instructed that the prosecution had to prove that defendant "willfully *attempted* to deter or prevent an executive officer from performing any duty . . . ." (CALJIC No. 7.50, italics added.) From this, the jury would have understood that the specific intent to deter or prevent was an element of the crime. Moreover, it could not have been confused by the instruction on general criminal intent. That instruction stated that the prosecution had to prove that defendant "intentionally d[id] that which the law declares to be a crime . . . " (CALJIC No. 3.30) -- i.e., that he *intentionally attempted* to deter or prevent. The jury could only have interpreted this as requiring the necessary specific intent.

We conclude that the trial court instructed properly on the specific intent element of Penal Code section 69.

IV

FAILURE TO INSTRUCT ON LESSER INCLUDED OFFENSE

Defendant contends the trial court erred by failing to instruct on resisting an officer (Pen. Code, § 148, subd. (a)(1)) as a lesser included offense of resisting an executive officer (Pen. Code, § 69).

As already discussed (see part III, *ante*), the crime of resisting an executive officer can be committed in two alternative ways. First, it can be committed by "attempt[ing], by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law . . . ." (Pen. Code, § 69.) Second, it can be committed by "knowingly resist[ing], by the use of force or violence,

such officer, in the performance of his duty . . . ." (*Ibid*.) This crime is a "wobbler." (*Ibid*.)

The crime of resisting an officer is committed by "willfully resist[ing], delay[ing], or obstruct[ing] any public officer, peace officer, or an emergency medical technician . . . in the discharge or attempt to discharge any duty of his or her office or employment . . . ." (Pen. Code, § 148, subd. (a)(1).) This crime is a misdemeanor. (*Ibid*.)

We may assume, without deciding, that the latter is a lesser included offense of the former. On that assumption, the only way the jury could have found that defendant committed the lesser but not the greater offense was if it found that he did resist, delay, or obstruct an officer, but not by means of force, violence, or threat. We therefore further assume, without deciding, that there was substantial evidence of this. From these assumptions, it follows that the trial court erred.

However, an "erroneous failure to instruct on a lesser included offense is not prejudicial where 'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions.' [Citation.]" (*People v. Millwee* (1998) 18 Cal.4th 96, 157, quoting *People v. Sedeno* (1974) 10 Cal.3d 703, 721.) The jury did find defendant guilty of assaulting Officer Lucero, a peace officer engaged in the performance of his duties. (Pen. Code, § 241, subd. (b).) It also found that defendant did not use a firearm in the commission of the assault. The jury therefore necessarily found him guilty of assault based on his struggle with Officer Lucero. In light of the chase that led up to this struggle, the jury could not possibly have

found that defendant did commit this assault, but did so for some purpose *other than* deterring, preventing, or resisting Officer Lucero's performance of his duties.

We conclude that the jury necessarily found that defendant resisted an officer by means of violence. Any error in failing to instruct on resisting an officer was therefore harmless.

V

FIVE-YEAR PRIOR SERIOUS FELONY ENHANCEMENT

Defendant contends the trial court erred by imposing a five-year prior serious felony conviction enhancement (Pen. Code, § 667, subd. (a)) because this enhancement applies only when the current conviction is also for a serious felony, and defendant was not convicted in this case of any serious felony. The People concede that this was error. We agree. (See *People v. Prieto* (2003) 30 Cal.4th 226, 276 [possession of a firearm by felon is not a serious felony].) Accordingly, we will strike this enhancement. (See *ibid*.)

VI

ON-BAIL ENHANCEMENTS

Defendant contends the trial court erred by imposing on-bail enhancements (Pen. Code, § 12022.1) because he had not admitted them and they had not been found true. The People concede that this was error. We, however, do not accept the People's concession.

The sentencing minute order notes the appearances of the parties, then recites:

"Court and counsel agree that the enhancements in count 4 (PC sections 12022.1 & 12022.53(b)) are moot in that the jury convicted the defendant of a misdemeanor lesser charge of PC section 241(b).

"Court orders enhancement(s) CB-12022.1PC in count 4 stricken.

"Court orders enhancement(s) B1-1192.7(c)(8)PC in count 4 stricken.

"Court orders enhancement(s) D2-12022.53(b)PC in count 4 stricken.

"*Counsel stipulate that the out-on-bail allegations pursuant to PC section 12022.1 in counts 6 & 9 were bifurcated and admitted by defendant before trial*.

"*Defendant admits enhancement(s) CB-12022.1PC in count 6*.

"*Defendant admits enhancement(s) CB-12022.1PC in count 9*.

"Court has read and considered the probation officer's report.

"Defendant waives arraignment for pronouncement of judgment.

"No legal cause why sentence should not now be pronounced." (Italics added; capitalization altered.)

By contrast, the reporter's transcript of the sentencing hearing simply begins:

"THE COURT: Call RIF-107176. Call the case of People versus Portwood . . . . And prior to coming out on the bench, I've read and considered the probation officer's report, the sentencing memorandum, statement in aggravation by the People and the statements in mitigation by the defense.

"Is there anything else that you folks wanted me to read?

"[DEFENSE COUNSEL]: No, your Honor.

"[PROSECUTOR]: No.

"THE COURT: Any legal cause?

"[DEFENSE COUNSEL]: No legal cause, your Honor."

The trial court then proceeded to sentence defendant. The sentence included a consecutive one-year on-bail enhancement on each of the two felonies of which defendant had been convicted.[2]

To summarize, then, the minute order reflects a substantial discussion, involving not only the on-bail enhancements, but also the enhancements to count 4, all occurring *before* the trial court's statement that it had read and considered the probation officer's report, and *before* defense counsel's statement, "No legal cause . . . ." During that discussion, the parties stipulated that defendant had already admitted the on-bail enhancements; moreover, defendant admitted them again. None of this, however, is reflected in the reporter's transcript.

When the clerk's transcript and the reporter's transcript conflict, we must determine which, under the circumstances, is entitled to greater credence. (*People v. Smith* (1983) 33 Cal.3d 596, 599.) Here, "[t]he reporter's transcript is contradictory only in the sense it is apparently incomplete." (*People v. Malabag* (1997) 51 Cal.App.4th

---

[2] The trial court erred by imposing two enhancements. Subject to one exception, not applicable here, an on-bail enhancement can be imposed only once in a given case. (*People v. Augborne* (2002) 104 Cal.App.4th 362, 375-377; *People v. McNeely* (1994) 28 Cal.App.4th 739, 743; *People v. Nguyen* (1988) 204 Cal.App.3d 181, 195-196; cf. *People v. Warinner* (1988) 200 Cal.App.3d 1352, 1356 [two enhancements may be imposed when defendant was on bail in two different cases].) The trial court also erred, however, by imposing one-year enhancements. An on-bail enhancement is two years. (Pen. Code, § 12022.1, subd. (b).) The two errors cancel each other out. However, we will modify the judgment to make the record clear.

1419, 1422.) The fact that the minute order goes into considerable detail about the discussion convinces us that it is not a mere slip of the clerk's pen. "[T]he clerk's detailed minutes support the presumed validity of the court's orders." (*Id*. at p. 1423.) Defendant could have shown that the minute order was erroneous and the reporter's transcript correct by obtaining a settled statement. (*Ibid*.) He did not do so. We conclude that the minute order is correct.

Inasmuch as defendant evidently admitted on-bail enhancements, the trial court could properly impose one.

VII

THE APPLICATION OF *BLAKELY*

Defendant contends that both upper term sentencing and consecutive sentencing violated *Blakely*.

This court has already rejected the contention that upper term sentencing violates *Blakely*. (*People v. Joy* (2004) 124 Cal.App.4th 1115, petn. for rev. filed Jan. 20, 2005.) Although we recognize that the California Supreme Court may yet grant review in *Joy*, rendering it no longer citable as authority, we would still adhere to the views we stated in it. Rather than reiterate them, we incorporate them here by reference.

We also note that here, the trial court imposed the upper term because it found that defendant's prior convictions were increasingly serious. (Cal. Rules of Court, rule 4.421(b)(2).) As the probation report showed, defendant had two separate juvenile adjudications for misdemeanors, followed by adult convictions for misdemeanors, followed by adult convictions for felonies. Thus, the trial court was entitled to rely on

this factor under the "prior conviction" exception to *Blakely* and its predecessor, *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435]. (See also *Almendarez-Torres v. U.S.* (1998) 523 U.S. 224 [118 S.Ct. 1219, 140 L.Ed.2d 350].)

Similarly, we concur with those courts that have rejected the contention that consecutive sentencing violates *Blakely*. (E.g., *People v. Palacios* (2005) ___ Cal.App.4th ___, ___ [2005 WL 236821 at pp. 16-17] [Fourth Dist., Div. One]; *People v. White* (2004) 124 Cal.App.4th 1417, 144 [Second Dist., Div. Four], petn. for rev. filed Jan. 18, 2005; *People v. Dalby* (2004) 123 Cal.App.4th 1083, 1102-1103 [Third Dist.], petn. for rev. filed Dec. 9, 2004.) We incorporate by reference the reasoning in those cases.

We conclude that the trial court did not err by imposing an upper term sentence and by sentencing consecutively.

VIII

DISPOSITION

The judgment is modified by striking the five-year prior serious felony enhancement and by imposing one 2-year on-bail enhancement in place of the two 1-year on-bail enhancements. The judgment, as modified, is affirmed. The trial court is directed

to prepare an amended abstract of judgment and to forward a certified copy of the amended abstract to the Department of Corrections. (Pen. Code, §§ 1213, 1216.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P.J.

HOLLENHORST
J.